IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	:	
	:	
-v-	:	CR 00-S-0422-S
	:	
ERIC ROBERT RUDOLPH,	:	
Defendant	:	

UNITED STATES'S CONSOLIDATED RESPONSE TO DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE AND FRUITS SEIZED PURSUANT TO WARRANTS

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama and Michael W. Whisonant, and William R. Chambers, Jr., Assistant United States Attorneys, and respectfully files this Response to the Defendant's Consolidated Motions to Suppress Evidence and Fruits Seized Pursuant to Warrants. The United States respectfully submits that all four of Rudolph's Motions should be denied, and in support thereof submits the following:

On September 13, 2004, Rudolph filed the four present Motions to Suppress evidence obtained as a result of search warrants executed during this investigation. Rudolph's Motions address the following five warrants:

1. Search Warrant 2:98M08, executed at Cal's Mini Storage on February 2, 1998;

2. Search Warrant 2:98M09, executed at Rudolph's trailer on February 4, 1998;

3. Search Warrant 2:98M10, executed at Cal's Mini Storage on February 5, 1998; and

4. Search Warrants 2:98M20 and 2:98M21, executed at Rudolph's trailer and Cal's Mini Storage on March 5, 1998.

This brief sets forth a consolidated response to all four suppression motions. For the reasons set forth in this Response, this Court should conclude that Rudolph abandoned any reasonable expectation of privacy in any of the seized property when he fled into the North Carolina wilderness after being identified by law enforcement as a material witness to the Birmingham bombing. This conclusion alone compels that Rudolph's Motions be denied without the need to adjudicate the validity of the warrants or resulting searches.[1]

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[1] While not specifically argued in this Response, the challenged evidence is also admissible under the inevitable discovery doctrine, Nix v. Williams, 467 U.S. 431, 444 (1984) ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received."), because the owners of the trailer and storage unit from which the evidence was seized eventually removed and disposed of all of Rudolph's property in accordance with state law after he failed to continue paying rent. Like abandonment, the inevitable discovery doctrine provides an independent basis for the Court to admit the challenged evidence without adjudicating the search warrants. The government reserves the right to more fully argue the applicability of this doctrine in the event that such an argument becomes necessary.

In the event that the Court concludes that it must rule upon the validity of the search warrants, this Response next addresses the validity of the warrants themselves, but only to the extent that it is necessary to do so. For example, the United States does not intend to introduce at trial any of the evidence seized as a result of the February 2, 1998, search at Cal's Mini Storage (Search Warrant 2:98-M-08). Consequently, Rudolph's arguments with respect to Search Warrant 2:98-M-08 are moot.[2]

With respect to Search Warrant 2:98-M-09, Rudolph argues only that some of the items seized fall outside the scope of the search warrant. The seized items, however, fall well within the scope of the items to be seized as defined in the warrant, and therefore the seizure of these items was permissible. In addition, the seized items are admissible under the plain view doctrine. The Court therefore should reject Rudolph's challenge to the seizure of these items.

Rudolph abandoned the property seized pursuant to Search Warrants 2:98-M-10, 2:98-M-20, and 2:98-M-21. As stated earlier, Rudolph's abandonment of his

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[2] Notwithstanding the United States' intention not to introduce evidence seized from the February 2, 1998, search at Cal's Mini Storage, the United States believes that Search Warrant 2:98-M-08 is a valid search warrant and the items seized properly fit within the scope of the warrant. The United States expressly reserves the right to raise these arguments, if necessary, in any later proceedings in this case or any other litigation.

property constitutes an independent basis to admit the seized evidence without even addressing the validity of the search warrants. This is especially appropriate in this case. Here, Rudolph intended to remove himself not only from any connection with his property; he intended to remove himself entirely from civilization, and succeeded in doing so for five years. The factual circumstances that circuit and district courts have deemed sufficient to constitute abandonment pale in comparison to Rudolph's extended desertion from society.

Background

Early in the morning on Thursday, January 29, 1998, employees began reporting for work at the New Woman, All Women Health Care Clinic located at 1001 17th Street South in Birmingham. These employees included Robert Sanderson, an officer with the Birmingham Police Department who worked as a security guard at the clinic during off-duty hours, and Emily Lyons, a nurse who lived in Birmingham. Officer Sanderson stood near the sidewalk in front of the clinic, while Lyons walked to the clinic from the parking lot. Officer Sanderson leaned over what appeared to be an artificial plant near the sidewalk; partially buried underneath this artificial plant was a homemade bomb, containing nitroglycerin dynamite and about six pounds of nails designed to be propelled from the bomb as shrapnel. The bomb also contained a radio remote control device that allowed the bomb to be detonated

some distance away from the clinic.

At approximately 7:30 a.m., the bomb exploded as Officer Sanderson leaned directly over it. The blast severed Officer Sanderson's right arm from his body and caused multiple compound fractures to his legs. The blast cut a gaping hole in his head and shrapnel penetrated his chest and abdominal area. The explosion caused first, second and third degree burns over most of his body. Officer Sanderson was thrown several feet away and died lying outside the clinic. Meanwhile, shrapnel from the bomb shattered Emily Lyons' left leg and tore into her eyes and face, breaking numerous facial bones. Nails and other shrapnel tore through her legs and abdominal area. The explosion caused first, second and third degree burns over most of the front of her body. She was rushed to the hospital and spent hours in surgery before being stabilized in critical condition. Lyons lost her left eye, and her right eye was seriously damaged, causing substantial vision loss. Her left leg nearly had to be amputated. Both of her legs had skin and muscle tissue blown off, necessitating numerous painful skin grafts. Several fingers on her right hand were broken and her left eardrum ruptured due to the blast, resulting in hearing loss.

The Indictment alleges that Defendant Eric Rudolph constructed, placed, and detonated the bomb, murdering Officer Sanderson and critically injuring Emily Lyons.

Through a series of investigative events, law enforcement agents obtained information that linked Rudolph to the Birmingham bombing. On Friday, January 30, 1998, United States Magistrate Judge Paul Greene issued a material witness warrant for Rudolph regarding the bombing. At approximately 5 p.m. on that date a press conference was held by local, state, and federal law enforcement officials announcing that a material witness warrant had been obtained for Rudolph. The press conference was attended by members of the local and national media.

At 6:56 p.m. (e.s.t.) on January 30, 1998, less than an hour after the media began reporting on the link to Rudolph in the Birmingham bombing investigation, Rudolph bought dinner at a Burger King in Murphy. Fifteen minutes later, at 7:11 p.m. (e.s.t.), Rudolph was checking out at a cash register at the Murphy Bi-Lo Supermarket, paying cash for 14 containers of oatmeal, nine cans of green beans, seven packs of batteries, eight containers of nuts, eight cans of tuna fish, some soap, and eight containers of raisins. A reasonable person can conclude that Rudolph heard that law enforcement was looking for him in connection with the bombing, and he was buying his last supplies before he fled. Rudolph then slipped out into the mountain wilderness surrounding Murphy, and would remain hiding there for more than five years.

On January 30, 1998, during the time that the government was seeking the

material witness warrant in Birmingham, law enforcement officers in North Carolina learned that Rudolph had an account with the local power company for a trailer located off Cane Creek Road in Murphy, North Carolina. Law enforcement officers arrived at the trailer at approximately 8:00 p.m. (e.s.t.) and observed that lights were on in the trailer. The main door of the trailer was open, although a storm door was closed. Agents set up surveillance on Cane Creek Road to identify anyone entering or leaving the trailer, but saw no one do so. Rudolph had fled.

In the morning on February 1, 1998, agents received a tip from Calvin Stiles, the owner of Cal's Mini Storage in Marble, North Carolina, that Rudolph had rented Unit 91 there. Almost immediately afterward, agents arrived at Cal's Mini Storage to interview Stiles and set up surveillance on the storage unit. Like the trailer, agents maintained constant surveillance on the storage unit until a search warrant could be obtained.

On the evening of Saturday, February 1, 1998, agents presented an affidavit to United States Magistrate Judge Max O. Cogburn, Jr., of the Western District of North Carolina, in support of a search warrant for Unit 91 at Cal's Mini Storage. At 10:57 p.m. that day, Judge Cogburn signed the warrant, which was assigned case number 2:98-M-08. Agents searched the storage unit the following day.

By Monday, February 3, 1998, the surveillance of Rudolph's residence showed

that Rudolph had not returned there. Late in the afternoon on February 3, 1998, agents presented a second affidavit to Magistrate Judge Cogburn, this time seeking a warrant to search Rudolph's residence. At 5:00 p.m. that day, Magistrate Judge Cogburn signed the warrant, assigned case number 2:98-M-09.

On February 4, 1998, agents searched Rudolph's trailer pursuant to Search Warrant 2:98-M-09. After a preliminary survey of the area, agents wearing Tyvec suits and booties entered the trailer at 8:30 a.m. and secured the interior, after which a canine trained to detect explosives walked through the residence. A photographer documented the interior and exterior of the trailer. Agents wearing Tyvec suits and booties then searched the interior of the trailer, seizing a number of items and taking various samples to test for residue and fibers. Among other things, the agents seized two Wal-Mart receipts reflecting the purchase of items that commonly are used in the construction of explosive devices. The agents seized a number of items after the canine alerted to the presence of explosive residue on the items, and also seized various household items, such as books, writing pads, and weapons, that they believed could have been contaminated with residue after Rudolph handled them.

Also on February 4, 1998, agents obtained a second search warrant for Unit 91 of Cal's Mini Storage, assigned case number 2:98-M-10. The agents performed the second search of the storage unit on February 5, 1998.

At the same time, law enforcement began assembling personnel from multiple federal, state, and local law enforcement agencies for one of the largest and most intensive manhunts in United States history. Several hundred officers and support personnel mobilized to a command post in Andrews, North Carolina, and used aircraft, technical surveillance, forward-looking infrared radar, tracking dogs, SWAT teams, mail covers, pen registers and trap and traces, and human source development to find Rudolph. Officers fanned out and combed the mountains of western North Carolina in a 500,000 acre area that featured "triple canopy" landscapes, which means deep and tangled national forests. Meanwhile, other officers investigated thousands of leads both domestically and internationally, all in an effort to locate Rudolph.

On February 8, 1998, several deer hunters called law enforcement after they saw a truck matching the description of Rudolph's truck that appeared to be stuck well off the road in deep woods. Agents again obtained a search warrant, assigned case number 2:98-M-12, for the truck. The search of the truck yielded, among other items, the receipts showing Rudolph's purchases from the Burger King and Bi-Lo Supermarket.

Meanwhile, the manhunt intensified. Constant surveillance showed that Rudolph did not return to the trailer or the storage unit. Agents obtained and executed a second search warrant for Rudolph's trailer, assigned case number 2:98-

M-20, and a third search warrant for the storage unit, assigned case number 2:98-M-21.

More than five months later, on July 7, 1998, Rudolph emerged from the woods to pay an unannounced visit to the home of G.N., who was an acquaintance of Rudolph and his family. G.N. lived in Topton, North Carolina, located approximately 32 miles from Rudolph's trailer in Murphy and approximately 25 miles from Cal's Mini Storage in Marble.

Rudolph told G.N. that he had been hiding from law enforcement in the mountains, relying upon a supply of food that he previously had hidden in the wilderness. Rudolph told G.N. that he was aware that law enforcement had identified him as a suspect in the Birmingham bombing, and that law enforcement was engaged in a large-scale manhunt to find him. Rudolph advised G.N. that his hiding place was located some distance away from G.N.'s residence. Rudolph also told G.N. that he had implemented a procedure to restock his supplies in which Rudolph would hide supplies near a road and then backpack the supplies to his hiding place. Rudolph advised G.N. that, despite these efforts, his supply of food had run out, and that he was surviving on only 500 calories each day–pointing to his thinning stomach as evidence of his hunger. Rudolph further said that the batteries in his radio were wearing out, and he needed new batteries.

Rudolph told G.N. that he intended to remain at large and continue hiding in the mountains for another year. Indeed, Rudolph suggested to G.N. that, even before he fled, he had hatched a plan in the event he needed to evade law enforcement. Specifically, Rudolph told G.N. that he earlier had provided false information about where he would hide in the mountains to one of his friends, R.C., because he believed that if he fled, R.C. would supply this information to the authorities. Rudolph opined to G.N. that he believed that his plan was working, as he understood that R.C. was feeding this information to a Macon County Sheriff's deputy.

Rudolph told G.N. that, given his dwindling supplies, he needed G.N. to collect a large supply of food and camping materials. Rudolph told G.N. that he trusted G.N. to help him without calling the police because Rudolph earlier had entered G.N.'s residence and taken vitamins and food supplements, leaving a $100 bill in return. Rudolph said that he did this to "test" G.N.

Rudolph then provided G.N. with a list including dry and canned foods, batteries, a camouflage tarp, and other food and camping items for G.N. to purchase and provide to Rudolph. Rudolph initially asked G.N. to drop the supplies at an undisclosed roadside location. When G.N. refused, Rudolph said he would return on Thursday, July 9, 1998, to take the items, and he offered to handcuff G.N. and take his car in order to create the impression that Rudolph stole the vehicle and the food.

G.N. initially agreed to provide the requested items to Rudolph and in fact collected a large quantity of dry beans, canned goods, bread, vitamins, first aid supplies, batteries, and other things. Ultimately, however, G.N. became afraid and did not meet Rudolph at the appointed time on July 9. When G.N. returned to his residence on the morning of July 10, 1998, he discovered that Rudolph had entered his residence and taken canned goods, raisins, grains, other food items, gasoline cans full of gasoline, and plastic garbage bags, and had driven off in G.N.'s blue 1997 Datsun pick-up truck. G.N. also discovered that Rudolph left five $100 bills for him, as well as a note in which Rudolph apologized for placing G.N. in this situation and promised that law enforcement would never find him.

On July 10, 1998, G.N. notified law enforcement about these events. Agents performed a survey of the area around G.N.'s residence and discovered several campsites in locations that afforded surveillance opportunities of the G.N. home. Agents confirmed that Rudolph's fingerprints were found on one of the items discarded at these campsites.

At approximately 12:00 p.m. on July 13, 1998, a U.S. Forest Service officer discovered G.N.'s truck parked near the Bob Allison Campground in the Nantahala National Forest, located approximately 10 miles from G.N.'s residence. A note had been left on the truck stating that the truck had broken down and asking the reader to

call G.N. at his health food store and advise that the truck was parked at the campground.

Rudolph remained in hiding in the wilderness for almost five more years. At 3:27 a.m. on May 31, 2003, Murphy Police Officer Jeffrey Postell was performing a routine patrol of the parking lot at the Sav-A-Lot Supermarket in Murphy, when he saw what he perceived to be a suspicious person running behind the supermarket. Postell saw the person attempt to hide behind some milk crates, and Postell drew his revolver, ordered the person out from behind the crates, and instructed him to lie on the ground. When the person did so, Postell performed a pat-down of the individual and placed him in handcuffs. The man told Postell that he was homeless and had no identification.

Postell soon was joined by Cherokee County Sheriff's Deputy Sean Matthews, TVA Police Officer Jody Bandy, and Murphy Police Officer Charles Kilby. Each officer asked the person to provide his name and address and asked what he was doing behind the supermarket. The individual repeatedly said that his name was Jerry Wilson, that he was from Ohio, and that he was camping under a bridge because he was homeless. The man also told the officers that he was hungry and looking for food in the dumpster behind the Sav-A-Lot store. The officers noted that Rudolph was dressed in camouflage gear, and that he had several plastic storage and garbage

bags along with string stored in his jacket.

When the officers ran the individual's fingerprints, they confirmed that Postell had in fact captured Rudolph.

DISCUSSION

I. Rudolph Abandoned Any Legitimate Expectation of Privacy in the Searched Locations

Rudolph fled from his residence in Murphy, North Carolina, within hours if not minutes of national and local media broadcasts announcing that federal law enforcement officers in Alabama had obtained a material witness warrant for his arrest in connection with the Birmingham bombing. He disappeared into the wilderness for more than five years, hiding in an effort to avoid being arrested on the present charges. In doing so, Rudolph abandoned any expectation of privacy in any property at his trailer as well as his storage unit at Cal's Mini Storage. By itself, this ground provides a legitimate basis for the government to seize items from both locations even in the absence of any search warrants. The United States therefore respectfully suggests that the Court rely on this ground alone to uphold the seizures of property at the storage unit and Rudolph's residence, thus eliminating the need to examine the validity of the search warrants.

To determine whether a defendant may challenge a search, a court must determine whether a defendant possessed a legitimate expectation of privacy in the place that was searched. Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting Rakas v. Illinois, 439 U.S. 128, 143-44 (1978)). While the burden of proving a legitimate expectation of privacy in an area searched is on the defendant, the government bears the burden of proving that a defendant abandoned his expectation of privacy in seized property. United States v. Ramos, 12 F.3d 1019, 1023 (11th Cir. 1994).[3] The government must make this showing by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168-69 (1986).

The Eleventh Circuit has adopted an analytical framework for the abandonment doctrine that focuses on the intentional relinquishment of the defendant's expectation

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[3] Given that the search warrant applications were prepared by North Carolina agents and the warrants signed by a North Carolina magistrate judge, the United States acknowledges the possibility that certain Fourth Amendment issues could raise a conflict-of-law question. See United States v. Ozuna, 129 F. Supp. 2d 1345, 1354 (S.D. Fla. 2001), aff'd without opinion, No. 01-10568 (11th Cir. Sept. 6, 2002) ; United States v. Restrepo, 890 F. Supp. 180, 191-92 (E.D.N.Y. 1995); United States v. Gerena, 667 F. Supp. 911, 913 (D. Conn. 1987). As shown in this Response, however, the relevant legal standards governing the issues addressed here do not give rise to conflicting authority between the Eleventh and Fourth Circuits. For this reason, the Court need not consider whether to apply a lex loci approach in assessing the validity of the seizures, or whether to apply Eleventh Circuit law. The United States will be mindful of the possibility that conflict-of-law issues arise when responding to any future arguments by Rudolph.

of privacy with regard to the property in question. The "critical inquiry is whether the person prejudiced by the search ... voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." United States v. Pirolli, 673 F.2d 1200, 1204 (11th Cir. 1982) (quoting United States v. Colbert, 474 F.2d 174, 176 (5th Cir. 1973)). "Abandonment is primarily a question of intent, and may be inferred from words spoken, acts done and objective facts," including evidence obtained after the time of the search. Id. (quoting Colbert, 474 F.2d at 176); United States v. Winchester, 916 F.2d 601, 604 (11th Cir. 1990).

When examining whether property has been abandoned for Fourth Amendment purposes, courts are careful to emphasize a person's reasonable expectation of privacy in an item or place over a person's common-law property rights in the item or place. This distinction is based upon the hornbook principle that the boundaries of Fourth Amendment law are not defined by property-law concepts. Oliver v. United States, 466 U.S. 170, 183-84 (1984). As stated by one commentator:

> [T]he significance of abandoned property in the law of search and seizure lies in the maxim that the protection of the fourth amendment does not extend to it. Thus, where one abandons property, he is said to bring his right of privacy therein to an end, and may not later complain about its subsequent seizure and use in evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without

probable cause.

Mascolo, The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff. L. Rev. 399, 400-01 (1971).

A helpful example of this principle is found in United States v. Levasseur, 816 F.2d 37 (2d Cir. 1987), a case that has been relied upon as persuasive authority by the Eleventh Circuit Court of Appeals. See Winchester, 916 F.2d at 604 (citing Levasseur). In Levasseur, two defendants fled from law enforcement on November 4, 1984, from a residence for which rent already had been paid for the entire month of November. United States v. Levesseur, 620 F. Supp. 624, 630 (E.D.N.Y. 1985). The district court noted that "it is plain that a finding of abandonment is not foreclosed until the period for which rent has been paid runs out," and instead relied upon evidence in the record showing that the defendants had no intention of returning to the residence after police had identified their whereabouts. Id., aff'd, Levasseur, 816 F.2d at 44; see also United States v. Thomas, 864 F.2d 843, 945-47 (D.C. Cir. 1989) (suspect fleeing the police who discarded or hid incriminating evidence has abandoned that evidence even when it is clear that he intended to return and retrieve the evidence had he eluded capture); United States v. Anderson, 663 F.2d 934, 938 (9th Cir. 1981) ("Abandonment here is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that

he no longer retained a reasonable expectation of privacy in it at the time of the search.") (quoting United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976)); United States v. Haynie, 637 F.2d 227, 237 (4th Cir. 1980) ("the proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned").

Two cases are particularly apposite to the Court's examination of Rudolph's reasonable expectation of privacy in his residence and storage shed after his flight into the mountains. First, in Winchester, the defendant was a fugitive since 1985, and the record reflected that he was aware of his fugitive status. 916 F.2d at 603-04. In 1987, deputy marshals received a tip that Winchester was living in a cottage, so they staked out the cottage. Id. at 604. The deputies saw Winchester drive up to the cottage and then drive away, past marked police cars and 25 officers. Id. The deputies searched the cottage after Winchester left and seized a Glock pistol found there. Id. The deputies then stayed at the house until midnight, and Winchester still did not return. Id. On the day after the search, Winchester called the marshals and referred to the pistol seized during the search, asking "How do you like the Glock?" Id.

The Eleventh Circuit concluded that Winchester's flight showed that

Winchester "abandoned the cottage and the property contained in it, including the firearm." Id. at 604. Importantly, the court relied heavily on facts that occurred after the marshals seized the Glock, including Winchester's failure to return to the cottage and his taunting call to the marshals. Id. "[E]vents that occurred after the abandonment may be considered by the court as evidence of the defendant's intent to abandon the property at the previous time." Id.[4]

The second case, Levasseur, involves a factual record that is directly analogous to the facts of the present case. Thomas and Carol Manning and several other defendants were the objects of an intensive, ten-year manhunt following a series of bombings and other violent acts in Massachusetts and New Jersey. 620 F. Supp. at 626. A federal grand jury charged the Mannings with participating in a conspiracy to bomb federal and private buildings between 1982 and 1984. Id. On November 4, 1984, some of the defendants were arrested in Cleveland, and agents learned that morning that the Mannings were residing in a house in Ashtabula, Ohio. Id. The rent for this residence was due in advance on the 22nd of each month, and was paid for the entire month of November. Id. at 627. The agents arrived there at 3:55 a.m. the

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[4] In addition, it is worth observing that the court relied exclusively on the factual record showing Winchester's flight from law enforcement, and did not even consider the property interests that Winchester had in the cottage at the time of the search.

following day, armed with arrest warrants for the Mannings, and announced their presence with a loudspeaker. Id. at 626. After hearing no response, agents entered the house and found no occupants, but they discovered many guns as well as a Bearcat scanner tuned to the FBI's radio frequency. Id. The agents opened a locked footlocker and seized additional guns and ammunition. Id. at 627.

The Mannings never returned to the house. Rather, the record showed that, at the time the codefendant was arrested in Cleveland, he spoke with Carol Manning by phone, giving rise to an inference that the Mannings learned of the codefendant's arrest. Id. On November 16, 1984, just days after the search, the Mannings obtained a new lease for a house in Norfolk, Virginia, using a false name, and evidence suggested that this house was indeed inhabited by the Mannings. Id. In fact, agents discovered a newspaper article from Winchester, Virginia, dated Nov. 5, 1984, regarding the arrests of the codefendants, giving rise to an inference that defendants left town the date of the search of the Ohio residence. Id.

The district court concluded that the record showed that the Mannings "had permanently left that house without any intention of returning and fled to places unknown in order to avoid arrest." Id. at 629. The court observed that, while the facts known at the time of the search certainly indicated that the Mannings intended to flee the residence, the facts learned after the search sealed the conclusion that they

were not coming back for their property: "[I]t is not material to a finding of abandonment that (the officer) did not know at the time that he entered the house whether appellant would return; it is sufficient that subsequent events show that appellant had already formulated the intent to abandon the house and the personal property inside." Id. at 629 (quoting United States v. Callabrass, 607 F.2d 559, 566 (2d Cir. 1979)). As noted earlier, the court also rejected a suggestion that, because the Mannings' lease remained paid in full at the time of the search, the property interests held by the Mannings were dispositive to the Fourth Amendment issue.

The Second Circuit affirmed unanimously. 816 F.2d at 44. Like the district judge, the court of appeals placed heavy reliance on the evidence of flight that was discovered after the search of the residence. "[S]ubsequently discovered events may support an inference that appellants had already chosen, and manifested their decision, not to return to the property." Id. The court's reasoning is instructive:

> Among the facts supporting this conclusion are the UFF members' history of living underground and fleeing suddenly as the FBI drew near, plus the Mannings' awareness that the FBI had just surrounded the Cleveland house and arrested their colleagues there. As the district court properly noted, the Mannings' failure to take their weapons, clothing, and personal belongings with them to Virginia does not necessarily indicate that they had intentions of returning to the Jefferson house. Instead, coupled with all the other signs of abandonment, it suggests that they learned of the Cleveland arrests while outside their home, and logically decided that it would be too risky to return to the Jefferson house just to pack. [cit.] Finally, the district court's finding of

> abandonment is solidly buttressed by the April 1985 discovery of evidence that the Mannings had settled in Norfolk within days of the Ohio arrests. This evidence includes the November 5, 1984 clipping from a locally distributed Winchester, Virginia newspaper, receipts for purchases of household appliances, and the lease and other documents confirming that the Mannings had moved into their Norfolk house by mid-November.

Id. As noted earlier, the Eleventh Circuit expressly adopted and applied this reasoning in Winchester. 916 F.2d at 604.

Here, Rudolph intended nothing less than to leave all his property behind and vanish into the mountains for more than five years. As contemplated by Winchester, Rudolph's intent to abandon his property is supported by facts known to the officers at the time of the search, but is conclusively established by the events occurring after the search.[5] Once Rudolph fled from his trailer on January 30, 1998, any reasonable expectation of privacy held by Rudolph extended only to the supplies in his backpack while Rudolph ducked through the dense wilderness and evaded the most intensive manhunt in United States history.

The facts show that Rudolph was aware of his fugitive status. At approximately 5 p.m. (c.s.t.) on January 30, 1998, the national media identified Rudolph as the subject of a material witness warrant in the Birmingham bombing

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[5] The factual record is stated more fully on pages 4-13 of this Response Brief, and is incorporated here as well.

investigation. Shortly thereafter Rudolph slipped into the rugged mountain wilderness, leaving his trailer with the lights on and the front door open, and never looked back. Considered as a whole, the factual record establishes that Rudolph abandoned all of his worldly possessions, except what he carried on his back, after the media identified Rudolph on January 30, 1998.

Agents arrived at Rudolph's trailer at approximately 9:00 p.m. (e.s.t.) on January 30, 1998, and constant surveillance for more than 3 days at the trailer and his absence from that point forward establishes that Rudolph never returned. As shown by Rudolph's statements to G.N., Rudolph had secreted caches of food in the mountains, and had formulated a plan to elude law enforcement by camping in the woods in the event that he was sought by the authorities. Rudolph's statements to G.N. also show that Rudolph was well aware that he was wanted in connection with the Birmingham bombings, and that law enforcement had tracked him to Murphy. However, Rudolph apparently needed a short-term supply of provisions to last while he evaded the mounting manhunt and reached these caches. Hence, before slipping into the wilderness Rudolph visited the Bi-Lo Supermarket in Murphy and paid cash for more than $100 of camping supplies: 14 containers of oatmeal, nine cans of green beans, seven packs of batteries, eight containers of nuts, eight cans of tuna fish, soap, and eight containers of raisins.

Fortified with the food and supplies purchased at Bi-Lo and caches of food in the mountains, Rudolph drove his truck into the wilderness to give himself a head start and ditched the truck in a location where he hoped it would not be found. Rudolph successfully evaded hundreds of law enforcement officers, dozens of dogs, and several aircraft, but after five months his supplies began dwindling and he became hungry. Rudolph had no choice but to ask for help, and he selected George G.N. after "testing" whether G.N. would report Rudolph to law enforcement.

Rudolph's statements to G.N. reduce to his own words what is apparent from his actions. Rudolph admitted that he had remained hidden in the North Carolina mountainside after leaving his trailer, and that his purpose in doing so was to evade arrest for the Birmingham bombing. He also admitted that, even after five months of running and considerable hunger, Rudolph planned to remain at large for another year (which, given his arrest nearly five years later, proved something of an understatement). Finally, Rudolph's taking of the food and G.N.'s truck, found later in the Nantahala National Forest, constitute direct evidence of Rudolph's intentions, which were anything but a return to his property in the residence and storage unit.

Rudolph remained in hiding until ultimately he was captured by Murphy law enforcement officers almost five years later. When he was initially detained, Rudolph immediately volunteered a false name and background, ostensibly with the hope that

he would not be identified and could once again escape into the mountains. Rudolph's statements, clothing, and gear show that he was still camping in the mountains, and had returned to town solely to pinch some food from the dumpster of the Sav-A-Lot Supermarket. In other words, Rudolph was not willing to come out of hiding, let alone assert an interest in any property he abandoned five years earlier. The circumstances of Rudolph's capture thus effectively drive a stake in the heart of any argument against abandonment, as five years of dogged flight from authorities nullifies any expectation of privacy whatsoever in his property.

In sum, the flight of the defendants in Winchester and Levasseur–which was deemed more than sufficient to constitute abandonment–seems rather halfhearted and lackadaisical when compared to Rudolph's efforts. Indeed, this case stands poised to replace both Winchester and Levasseur as the leading casebook example of the abandonment doctrine. Because Rudolph abandoned any reasonable expectation of privacy with respect to the property seized pursuant to the search warrants executed in this case, the Court should deny Rudolph's Motions to Suppress on this ground alone, without the need of adjudicating the validity of any of the search warrants.

II. The Validity of the Search Warrants Challenged by Rudolph

As summarized earlier, the Court need not consider the validity of the five search warrants challenged by Rudolph because his abandonment of the seized

property constitutes an independent basis for admission of the property at trial. In the event that the Court needs to adjudicate the validity of the warrants, the United States will address the validity of the warrants here.

A. The United States Does Not Intend to Introduce Evidence Obtained Pursuant to Search Warrant 2:98-M-08 At Trial

Because the United States does not intend to introduce into evidence at trial any items seized pursuant to Search Warrant 2:98-M-08, the Court need not consider the arguments raised by Rudolph with respect to the validity of this warrant. The United States's decision here is based upon expediency, and is not a concession that the warrant or resulting search is defective in any way. The United States expressly reserves the right to raise any arguments relating to the validity of this warrant in any later proceedings in this case or any other litigation.

B. Agents Lawfully Seized Evidentiary Items During the February 4, 1998, Search of Rudolph's Residence Pursuant to Search Warrant 2:98-M-09

Rudolph's sole challenge to the validity of the seizure of evidence from his trailer on February 4, 1998, is that some of the seized items fall outside the scope of Search Warrant 2:98-M-09. Rudolph's argument fails for two reasons. First, the seized items that the United States intends to introduce at trial fall well within the scope of the warrant based on the case law of this and other circuit courts. Second,

assuming for the purpose of argument that the Court concludes that any items to be introduced as evidence at trial fall outside the scope of the warrant, the Court should conclude that the items are admissible under the plain view exception to the warrant requirement.

1. The Items To Be Introduced at Trial Fall Well Within the Scope of Search Warrant 2:98M09

When assessing whether agents seized items outside the scope of the warrant, courts examine whether the search and seizure was reasonable under all the circumstances. United States v. Schandl, 947 F.2d 462, 465 (11th Cir. 1991). Factors that a court may weigh when determining whether a search was reasonable include the scope of the warrant, the behavior of the searching agents, the conditions under which the search was conducted, and the nature of the evidence being sought. Id.

When agents perform a search and identify property to be seized, agents "are required to interpret the warrant, but are not obliged to interpret it narrowly." United States v. Hill, 19 F.3d 984, 987 (5th Cir. 1994) (quoting United States v. Stiver, 9 F.3d 298, 302-03 (3d Cir. 1993) (internal quotation marks omitted). A warrant need only specify the items to be seized with reasonable specificity, conferring upon the agents executing the search some measure of discretion in determining whether an item possesses evidentiary significance in the manner set forth in the warrant. "Thus, the

question whether the evidence seized falls within the scope of the warrant ultimately turns on the substance of the item seized 'and not the label assigned to it by the defendant.'" Hill, 19 F.3d at 987 (quoting United States v. Word, 806 F.2d 658, 661 (6th Cir. 1986)). When searching for documents, some perusal may be needed to determine their relevance, and removal of documents for subsequent review may be appropriate. United States v. Lambert, 887 F.2d 1568, 1572 (11th Cir. 1989); United States v. Waugneux, 683 F.2d 1343, 1353 (11th Cir. 1982).

Search Warrant 2:98-M-09 authorized agents to seize the following items:

1. nails, batteries, knives and other cutting instruments;
2. tools;
3. records (in both digital and documentary form);
4. furniture, clothing, and household items capable of absorbing and retaining residue of high explosives or triggering devices;
5. black powder, smokeless powder, lead azide, mercury fulminate, or other explosive powders;
6. small metal tubes or other containers;
7. electric wires, light bulb filaments, rocket motor ignitors, pyrotechnic fuses, and safety fuses; and
8. receipts, notes, journals, diaries, calendars, address books, computer databases, and correspondence related to the construction, storage, procuring, and testing of explosive devices and/or their component parts.

The search performed pursuant to Search Warrant 2:98-M-09 resulted in the seizure of a number of items from Rudolph's residence, which are listed on the inventory filed after execution of the warrant. Rudolph argues that the following

items exceed the scope of the warrant:

- Two Wal-Mart sales receipts;
- A blue plastic Wal-Mart bag;
- a black Bible;
- 24 miscellaneous books;
- a green spiral notebook;
- a Mead writing pad;
- three Duncan Oil sales receipts;
- miscellaneous photos and negatives;
- one roll of 35mm film;
- a Panasonic audio tape;
- six guns, two daggers, and a bayonet;
- $1600 cash;
- a picture frame; and
- a Leupold glad ring box and receipt.

Of these items, the United States does not intend to introduce as evidence at trial the following evidence: the picture frame, Panasonic audio tape, Leupold gold ring box & receipt, miscellaneous photos and negatives, roll of 35 mm film, the green spiral notebook, and the Mead writing pad. The seizure of these items therefore is not at issue. United States v. Pearson, 746 F.2d 787, 791-92 (11th Cir. 1984) (argument that government seized items beyond the scope of a warrant is moot when the items are not introduced as evidence at trial).[6]

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[6] Rudolph does not argue that the seizure of items from Rudolph's residence was so broad that all the items seized must be suppressed. Such an argument would have no merit here anyway. United States v. Waugneux, 683 F.2d 1343, (11th Cir. 1982) ("Total suppression may be appropriate where the executing officer's conduct exceeds any reasonable interpretation of the warrant's provisions. [cit.] Courts have consistently held, however, that absent a 'flagrant disregard' of

Consequently, the only items that the government plans to introduce at trial, and that Rudolph alleges fall outside the scope of the warrant, include: (1) the two Wal-Mart sales receipts and blue plastic bag; (2) the black Bible; (3) 24 miscellaneous books; (4) the three Duncan Oil sales receipts; (5) the guns; (6) the daggers and bayonet; and (7) the $1,600 in cash.

These items fall directly within the scope of the items to be seized as listed in the warrant. For instance, the warrant expressly calls for the seizure of receipts that potentially relate to the construction of explosive devices. Both Wal-Mart sales receipts reflect the purchase of tools and parts that potentially are used in the manufacturing of such devices. One receipt reflects the purchase of hose clamps, gloves, and light bulbs, which are known to be tools used in the manufacture of bombs. The other Wal-Mart receipt shows the purchase of gloves, wooden dowels, Vaseline, and electrical tape, which also are known to be used in the construction of bombs.

The warrant further specifies that agents may seize "knives and other cutting instruments." The seizure of the two daggers and bayonets therefore was permissible

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the terms of the warrant, the seizure of items outside the scope of a warrant will not affect admissibility of items properly seized."). Moreover, assuming for the purposes of argument that agents seized an item that exceeds the scope of the warrant, this finding would not affect the admissibility of other evidence that falls within the scope of the warrant. Id.

as items defined in the scope of the warrant.

The warrant expressly calls for the seizure of "household items capable of absorbing and retaining residue of high explosives or triggering devices." As the agents explained in their affidavit filed in support of the warrant, the construction of bombs generates residues of varying sizes that attach to clothing and other surfaces–especially "items that have been handled by persons who have handled explosives." Affidavit, ¶ 40(a). The agents further explain that these residues may remain on these surfaces for months and even years, and may be detected using sensitive equipment. Id. The 24 miscellaneous books are household items capable of absorbing and retaining residue of high explosives or triggering devices, as is also the case with the guns and the seized currency. Notwithstanding the fact that the Wal-Mart receipts reflect the purchase of tools that commonly are used to construct bombs, the receipts also are capable of absorbing and retaining residue of explosives. Given these facts, the agents performing the search at Rudolph's residence reasonably could have deduced that the books, guns, currency, and paper receipts may have been handled by Rudolph, and that explosive residue may have been transferred from his hands to these items. The seizure of the these items therefore was warranted in order to allow for further testing to detect trace residues of explosives.

The same reasoning applies to the seizure of the Bible. However, the agents

had another, equally important reason to seize the Bible, as the pages of the Bible are covered with handwritten notes and scribblings. As described earlier, the warrant expressly calls for the seizure of "notes, journals, diaries, ... and correspondence related to the construction, storage, procuring, and testing of explosive devices and/or their component parts." Given the detailed handwriting on the pages of the Bible, and the inability of the agents to review all the notes during the course of the search, the agents justifiably seized the Bible once they determined that it contained such detailed handwritten notes. Lambert, 887 F.2d at 1572 ; Waugneux, 683 F.2d at 1353 (when searching for documents, some perusal may be needed to determine their relevance, and removal of documents for subsequent review may be appropriate).

It also is worth pointing out that, as evidenced by the long list of items found during a second search of the trailer, the agents actually seized a select few items during the execution of Search Warrant 2:98-M-09. The list of evidentiary items collected during the first search of the trailer, compared to the list of items seized during the second search and the amount of property left in the trailer after both searches, shows that the agents carefully considered the evidentiary value of the items they observed during the search and carefully adhered to the limits of the search set forth in the warrant.

For all these reasons, the seizure of these items did not exceed the scope of the

listed items to be seized as defined in the warrant.

2. The Seized Items Were Lawfully Seized Under the Plain View Doctrine

An officer may seize evidence that is in plain view despite the absence of a search warrant so long as: (1) the officer has lawful access to the seized object; and (2) the incriminating nature of the object is immediately apparent. Horton v. California, 496 U.S. 128, 141-42 (1990); United States v. Hromada, 49 F.3d 685, 690 (11th Cir. 1995). As observed by the Supreme Court, the phrase "immediately apparent" is "an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." Texas v. Brown, 460 U.S. 730, 741 (1983) (plurality opinion). The Court emphasized that the standard is simply one of probable cause, such that the officer need not believe that an item in fact is contraband or evidence of a crime; rather, the facts surrounding the item must give rise to "a practical, nontechnical probability that incriminating evidence is involved." Id. at 742; Arizona v. Hicks, 480 U.S. 321, 326-27 (1987); see also United States v. Bruce, 109 F.3d 323, 328 (7th Cir. 1997) (items were admissible under plain view exception even though "[n]one of these items were inherently incriminating, but in connection with the crime being investigated, each item took on a suspicious

nature, giving the officers probable cause to seize it").

Assuming for purposes of argument that the items seized by the agents fall outside the scope of Search Warrant 1:98-M-09, the items are admissible under the plain view doctrine. The agents lawfully were present in Rudolph's residence pursuant to a signed search warrant, and the list of items to be seized allowed the agents to search every room in the residence as well as any container or document found there. The sole remaining question, then, is whether the seized items were sufficiently incriminating to give rise to probable cause for their seizure.

As stated earlier, the two Wal-Mart receipts are directly incriminating because they reflect the purchase of tools and parts that may be used in constructing bombs. In the same way, the Wal-Mart plastic bag assumes increased evidentiary value given the importance of the information reflected in the Wal-Mart receipts.

The incriminating nature also is readily apparent with respect to the books, cash, and guns seized by the agents, in that these items all are handled on a regular basis and therefore could contain residues of explosives on them.

The incriminating nature of the Bible becomes more apparent because of the many handwritten notes covering its pages. United States v. Siussi, 29 F.3d 565, 570 (10th Cir. 1994) (circuit courts "have upheld the plain view seizure of documents even when the police only learned of the documents' incriminating nature by perusing

them during a lawful search for other objects"). It is common for people who construct and detonate bombs to make notes of their designs and results of experimentation, as well as their intentions or motivations for doing so. Once the agents saw the handwritten notes on these items, they reasonably could infer that the items might possess evidentiary value and could seize them for later review. Lambert, 887 F.2d at 1572; Waugneux, 683 F.2d at 1353 (when searching for documents, some perusal may be needed to determine their relevance, and removal of documents for subsequent review may be appropriate).

Finally, with respect to the Duncan Oil receipts, the agents reasonably could have identified these items as reflecting evidentiary value in the sense that they could confirm that Rudolph was, in fact, renting the trailer. At the time of the search, the agents knew that Rudolph had rented the trailer using an alias, and the name on the Duncan Oil account closely resembled the alias used by Rudolph. United States v. Wardrick, 350 F.3d 446, 453 (4th Cir. 2003) (seizure of gas bill permissible during drug search, although gas bill receipts were not expressly listed as an item to be seized, because the gas bill may constitute evidence to show that the defendant lived there).

SUMMARY

For the reasons set forth above, all four of Rudolph's motions to Suppress should be denied.

Respectfully submitted this the 4th day of October, 2004.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date, October 4, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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